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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JIMMY HOUSTON, Defendant and Appellant.	B202506 (Los Angeles County Super. Ct. No. BA301853)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

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Jimmy Houston appeals from a judgment entered after a jury found him guilty of first-degree murder (Pen. Code, § 187, subd. (a)).[1] The jury found true the allegations that appellant personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (d) & (e)(1)); that appellant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1); and that appellant personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e). The trial court sentenced appellant to a total term of 50 years to life, comprised of 25 years to life on count 1, which it enhanced by a second 25 years to life term based on the personal gun use finding. The trial court stayed one remaining gun allegations. We affirm.

CONTENTIONS

Appellant contends that: (1) the trial court's refusal to admit Editson Hernandez's (Hernandez) statement to police that Constantino Bustamonte (Bustamonte) had a gun denied appellant his right to a fair trial as guaranteed by the due process clause of the Fourteenth Amendment; (2) the trial court erred by allowing the jury to consider portions of a recorded interrogation of a witness under the state of mind exception to the hearsay rule; (3) the trial court erred by allowing the People to introduce photographs of the victim; and (4) the cumulative effect of the trial court's errors undermined the fundamental fairness of appellant's trial.

FACTS AND PROCEDURAL HISTORY

The shooting of Bustamonte

On April 26, 2006, appellant, Marvin Catalan (Catalan), and Hernandez exited a bus and walked toward a bus stop across the street. They noticed Bustamonte who was also walking toward the bus stop while listening to music on his I-Pod. Appellant said "Uh-oh, here comes trouble." Bustamonte asked them why they were staring at him and

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

if they knew him. Bustamonte then claimed to be from Rockwood. Appellant stared at Bustamonte, turned around, then fatally shot Bustamonte twice in the chest and once in the head. As Bustamonte fell, appellant said "Fuck Cockwood." Appellant and his friends ran away. Bystander Christina Alvarez, who had just exited the same bus as appellant, did not see Bustamonte reach for a weapon, hold a weapon, reach for his waistband, or lift up his shirt before he was shot by appellant.

Los Angeles Police Department Officer Francisco Carrillo was dispatched to the scene and apprehended Catalan, who matched the description of one of the suspects. Los Angeles Police Department Detective John Motto did not find a gun on Bustamonte's body. He found a screwdriver tucked in Bustamonte's waistband, three .45-caliber Winchester casings at the crime scene, and Bustomonte's I-Pod, which was still playing music, near his body.

Catalan's testimony

Catalan pled guilty to assault with a firearm and received a six-year sentence in state prison. In return for a grant of immunity, he was not prosecuted for his participation in two unrelated drive-by shootings. He testified that he, appellant, and Hernandez were members of the La Mirada gang, which is a rival to the Rockwood gang. Appellant's moniker is "Face." On the day of the murder they had been drinking and decided to meet some girls and patrol the neighborhood for rival gang members. They planned that Catalan and Hernandez would challenge, or "hit up," rival gang members in their neighborhood, then beat them up. If they needed help, appellant was to then shoot the rival gang member with the gun he kept in his waistband. The three men eventually ended up on Vermont and Third Street, which was outside their territory.

According to Catalan, they saw Bustamonte approaching the bus stop throwing some type of hand signs that may have been gang signs. Bustamonte did not act in an aggressive manner or reach for or have a weapon. Hernandez stared at Bustamonte in a hostile manner, referred to as "mad-dogging." In response, Bustamonte said "Do you know me from somewhere? I'm from Rockwood." Catalan noticed that appellant had pulled his shirt up and was getting ready to take the safety off the gun. Because they

were no longer in their own neighborhood, Catalan wanted to avoid a conflict, so he distracted Hernandez by saying "What time are we meeting the girls?" About 10 seconds later, Catalan heard gunshots and turned to see appellant shooting Bustamonte. After the third shot, appellant loudly said "Fuck Cockwood," a derogatory slang for Rockwood. He said it loud enough so that others would know he was the shooter and that he was putting in work for the neighborhood. Catalan was surprised that appellant shot Bustamonte because the plan was that he would use his gun only if Catalan and Hernandez could not handle a rival gang member. Also, they were only supposed to be patrolling and beating up rival gang members in their own neighborhood.

During Catalan's cross examination, defense counsel requested to play a portion of Catalan's taped interview with police officers in order to impeach him. In the interview, Catalan stated that he happened to run into appellant and Hernandez at Vermont and Third Street. After the defense played the tape for the jury, the People sought to introduce both tapes under Evidence Code section 356 on the basis that the People were entitled to show that Catalan's statements were consistent. The trial court ruled that the defense's introduction of inconsistent statements in the tapes triggered the People's right to put on consistent statements and to play the rest of the tapes. The trial court also stated that it would exercise its discretion to exclude irrelevant evidence and directed the People to play only relevant portions of the tapes.

Defense counsel then objected to the admission of the rest of the tapes on the basis that Catalan's statements regarding appellant's intentions were speculative.[2] The trial

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[2] Specifically, defense counsel objected to the following: "[Catalan]: If it's hood -- like I told you, if it's a hood that -- let's say for example, 18th, if he would have said 18th, we would have taken off on him. [Detective]: What does that mean? [Catalan]: We would have beat him up. We would just swing on him, do whatever. [Detective]: Okay? But what's [appellant] going to do? [Catalan]: That's -- well, I'm assuming that he would blast (unintelligible) to keep it with the Rockwood." Appellant also objected to the following statements: "[Catalan]: Because I guess if he would have claimed, I'm assuming that he would probably want to bust, Shoot.]" "Because I guess -- because I

court allowed the People to play the tapes because they shed insight into Catalan's state of mind regarding the plan between the three men. Moreover, with respect to defense counsel's assertion that Catalan's testimony was speculative, the trial court stated that evidence regarding the intent of the men in carrying out the plan had already been brought before the jury. Prior to playing the tape, and upon defense counsel's agreement, the trial court gave limiting instructions to the jury that it could consider Catalan's testimony as an explanation of what he believed a plan to be, rather than for the truth of the matter or for what appellant was thinking.[3]

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guess he would -- he wanted to avoid him not thinking that he was with us. Like, the guy that we hit up -- thinking that he was with us. So if he started getting crazy or popped out a gun or something, he wouldn't expect [appellant] to shoot back."

[3] The trial court gave the following limiting instruction: "Let me indicate that, at various times throughout the tape, Mr. Catalan characterizes what the defendant is doing, what he's thinking. And I'm permitting that to come in for the limited purpose of explaining what Mr. Catalan thought the plan was and what they were sort of agreeing to do. But I'm not allowing it in for the truth of the matter, which means that you may listen to this information being said by Mr. Catalan to help you understand what he's thinking, what he believed the deal is, but not that it's absolutely true what he's ascribing to the defendant. Does everybody understand what I'm saying? Because as you'll see later on, some of it's even more speculative. He'll say, "Well, I think he would have done this." And that doesn't come in for the fact that he would have done that, but only for his understanding of what the deal was. Does everybody understand? It's only coming in for that limited purpose and not what he's saying is true, that the defendant would have done this or said this or whatever."

After discussion with counsel, the trial court issued a clarification: "If the witness repeats what the defendant said, that may be considered for all purposes. If he says, for example, 'X said this when we were doing something' that comes in for all purposes. It turns out legally that's an admission. If he says, for example, 'You know, I think X would have said this or would have done this,' that's what I'm talking about as not coming in for the truth. So if he actually appears to be repeating what the defendant said -- If he says 'this is what defendant said,' then that can be considered by you for all purposes. Okay? If he says 'I think that defendant would have said this or would have done this or, you know, I think that's what he was thinking' or whatever, that's only coming in for his understanding of what the plan was and the execution of the plan."

Officer Jess Faber's gang expert testimony

Los Angeles Police Department Officer Jess Faber, a gang expert, testified that the area around Vermont and Third Street is 18th Street Gang territory. Officer Faber identified appellant as a member of the La Mirada Locos. During an interview, Hernandez told Officer Faber that appellant is a member of La Mirada Locos and his moniker is "Face." "Cockwood" is a derogatory term his gang uses to insult the Rockwood gang. The primary activities of the La Mirada Locos gang are murder, attempted murder, assault with a deadly weapon, robbery, vandalism, and selling drugs.

Appellant's testimony

Appellant testified that he is not a La Mirada gang member and did not make plans to shoot rival gang members. In fact, on the day of the shooting, appellant told Catalan and Hernandez to stop bothering a young man and his girlfriend when they were about to challenge the young man. As they approached a bus stop on Vermont and Third Street, appellant noticed Bustamonte throwing gang signs, and said "Here comes trouble." Catalan and Hernandez turned and stared at Bustamonte despite appellant's attempt to stop them. Bustamonte, who was an intimidating man, asked if they had a "staring problem" and said he was from Rockwood. Bustamonte said they should put their guns down and fight like men. Bustamonte lifted up his jacket and reached down with his right hand as if he were going to pull something out. In mortal fear, appellant pulled out his gun and shot Bustamonte.

Evidence Code Section 1230 hearing

Hernandez was not charged, nor did he testify. During trial, defense counsel made a motion under Evidence Code section 1230 to admit a statement by Hernandez to police that he saw Bustamonte with a gun. The trial court denied the motion, finding that Hernandez's statement about seeing a weapon in Bustamonte's waistband was not a declaration against interest because it did not expose Hernandez to any penal consequences or ridicule. The trial court also found that Hernandez's statements were not reliable or trustworthy.

DISCUSSION

I. The trial court did not deny appellant his right to a fair trial as guaranteed by the due process clause of the Fourteenth Amendment by excluding Hernandez's statement to the police

Appellant contends that the trial court's refusal to admit Hernandez's statement to police that Bustamonte had a gun denied appellant his right to a fair trial as guaranteed by the due process clause of the Fourteenth Amendment. We disagree.

Citing *Chambers v. Mississippi* (1973) 410 U.S. 284 (*Chambers*), for the proposition that trial courts may not impede a defendant's right to present a complete defense by imposing mechanistic or arbitrary rules of evidence, appellant contends that the trial court denied him a fair trial when it excluded Hernandez's statement that Bustamonte had a gun. *Chambers* holds that "Few rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations.] [But i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Chambers, supra*, at p. 302.) Both the United States Supreme Court and our Supreme Court have explained that *Chambers* is closely tied to the facts and the Mississippi evidence law that it considered. (*People v. Ayala* (2000) 23 Cal.4th 225, 269 (*Ayala*), citing *United States v. Scheffer* (1998) 523 U.S. 303, 316 and *People v. Hawthorne* (1992) 4 Cal.4th 43, 56.) In *Ayala*, the defendant sought to introduce statements two deceased persons had made to private investigators. The *Ayala* court held that the challenged statements did not fall within any exception to the hearsay rule and that the exclusion of the challenged statement did not result in any constitutional violation in light of the unreliability of the challenged statements, plus the defendant's attempt to supply false evidence to the jury that bore a similarity to the challenged statements. (*Ayala, supra*, at p. 270.)

We disagree with appellant's assertion that his case is distinguishable from *Ayala* because Hernandez's statements were highly reliable. We find that the trial court did not

err in its conclusion that Hernandez's statements were unreliable and inconsistent, which it reached in the context of its ruling on the Evidence Code section 1230 motion.

First, pursuant to Evidence Code section 1230, evidence of a statement by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement subjected him to the risk of civil or criminal liability or created such a risk of making him an object of hatred or ridicule in the community, that a reasonable man in his position would not have made the statement. We review the trial court's ruling on the admission of evidence under the abuse of discretion standard. (*People v. Sanders* (1995) 11 Cal.4th 475, 525.) We find that the trial court did not abuse its discretion in concluding that Hernandez's statements were not admissible hearsay as a declaration against penal interest. At trial, appellant's counsel argued that by virtue of speaking to the police while in custody, Hernandez was making declarations against his penal interest and that he was exposing himself to hatred in the community. But, as the trial court stated, the challenged statement that Hernandez saw Bustamonte with a gun in his waistband would not expose him to penal consequences or ridicule by the community. The trial court noted that Hernandez's statements were efforts to minimize his involvement in order to exculpate himself. It found that Hernandez's statements were inconsistent and unreliable. Hernandez told the police that appellant was 16 years old, then later contradicted himself, and said appellant was 20 years old. Also, Hernandez stated that Bustamonte was shot only once, which was false. We conclude that the trial court did not abuse its discretion in determining that Hernandez's statements were unreliable.

Next, we find that the trial court's refusal to admit Hernandez's statement to police that Bustamonte had a gun did not deny appellant his right to a fair trial as guaranteed by the due process clause of the Fourteenth Amendment. At trial, the trial court distinguished *Chambers*, *supra*, 410 U.S. at page 284 where a due process violation was found because the court in that case refused to allow three witnesses to testify to the fact that the main witness had confessed to them that he had committed the crime himself. Here, on the other hand, appellant was able to present his defense that he believed

appellant lifted up his jacket to pull out a weapon and that appellant shot him in mortal fear for his life. We find no constitutional error.

We conclude that appellant was not deprived of his right to a fair trial by the trial court's refusal to admit Hernandez's statement to the police.

II. The trial court did not violate appellant's right to a fair trial by allowing the jury to consider portions of the recorded interrogation of Catalan

Appellant contends that the trial court violated his right to a fair trial by allowing the jury to consider portions of the recorded interrogation of Catalan under the state of mind exception to the hearsay rule. Appellant urges that the statements were speculative and irrelevant. We disagree.

We review the trial court's determination on the admissibility of evidence under the abuse of discretion standard. (*People v. Sanders*, *supra*, 11 Cal.4th at p. 525.) Evidence Code section 356 provides, in pertinent part, "'[w]here part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party. . . .'" "'In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. "In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence. . . ." [Citations.]' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 959, superseded on other grounds by section 190.41.)

Relying on *People v. Gambos* (1970) 5 Cal.App.3d 187, 192 for the proposition that Evidence Code section 356 ensures that statements are not presented to the jury out of context by allowing the introduction into evidence of omitted statements that are necessary to explain the initial statements, appellant contends that the People did not have the unfettered right to introduce the entire taped interview. We conclude that the trial court did not abuse its discretion in allowing the People to present both tapes after defense counsel impeached Catalan with portions of his taped interview with police in

which he stated that he happened to meet Hernandez and appellant at Vermont and Third Street. The People were entitled to show that Catalan's statements were consistent with his testimony on the stand—that Catalan, Hernandez and appellant had planned to meet girls, patrol the neighborhood, beat up rival gang members, and that appellant would shoot them if necessary.

On appeal, appellant characterizes Catalan's statements that he assumed appellant would shoot rival gang members who fought back after Catalan and Hernandez picked a fight as speculative. He urges the statements should be barred under Evidence Code section 350. Again, we disagree with his assertion. Evidence Code section 350 states that "No evidence is admissible except relevant evidence." Relevant evidence is defined as evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) The challenged statements were relevant because they tended to show the plan among Catalan, Hernandez and appellant to hit up rival gang members, beat them up, and if necessary have appellant shoot them. Thus, Catalan's statements were relevant to the issue of whether appellant shot Bustamonte as part of a plan, or because he believed that Bustamonte had a weapon and was a threat to him. Nor is appellant's citation to *People v. Staten* (2000) 24 Cal.4th 434, 454 helpful. In that case, our Supreme Court simply found that a speculative statement by a bystander that two purported gang members he had never met might have committed killings in retaliation for the defendant cheating them in a drug sale was inadmissible hearsay, irrelevant, and unduly prejudicial. (*Id.* at p. 456.) Here on the other hand, Catalan's testimony was not the speculation of an unrelated bystander, but evinced a plan formed by him, Hernandez, and appellant.

We conclude that the trial court did not abuse its discretion by allowing the People to introduce the taped interview of Catalan. In any event, there is no reasonable likelihood of prejudice because the jury received limiting instructions which we presume it followed. (*People v. Pinholster* (1992) 1 Cal.4th 865, 919.) And, the record shows the jury had already heard evidence that Catalan, Hernandez and appellant had entered into a plan to challenge rival gang members and that appellant would shoot them if necessary.

Moreover, appellant shot Bustamonte three times, then yelled "Fuck Cockwood," indicating the premeditated, deliberate manner of the killing. It is not reasonably probable that the jury would have reached a different verdict if the challenged evidence had been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III. The trial court did not err in allowing the People to introduce photographs of Bustamonte

Appellant contends that the trial court prejudicially erred by allowing the People to introduce photographs of Bustamonte's body. We disagree.

The admissibility of photographic evidence is subject to the well-established rules of evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 132 (*Crittenden*).) "The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citation.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]" (*Id.* at pp. 133–134.)

In *Crittenden*, our Supreme Court held that the trial court did not abuse its discretion in admitting photographs of the victims' bodies depicting various knife wounds and blunt trauma to the bodies because they were relevant to establish the manner in which the victims were killed, including the nature and placement of the victims wounds. (*Crittenden, supra*, 9 Cal.4th at p. 133.) The court found that the photographs of the location and condition of the bound and gagged bodies were relevant to the issue of premeditation and deliberation and that the nature of the nonfatal wounds to one of the victims and his facial expression were relevant to demonstrate that the murder involved torture. (*Ibid.*) Moreover, the court rejected the defense claims that the failure to exclude the photographs was unduly prejudicial. The court found that the wounds were probative to the kind and degree of force used on the victims, indicative of malice, planning and deliberation. (*Id.* at p. 134.) The court found that the photographs, though unpleasant, were not unduly shocking or inflammatory in the sense of evidence

that uniquely tends to revoke an emotional bias against a party within the meaning of Evidence Code section 352. (*Crittenden, supra,* at p. 134.)

Here, the photographs were relevant because they clarified the deputy coroner's testimony regarding the placement of the wounds. The photographs depicted the entry and exit wounds of the gunshots to Bustamonte's chest and head. Appellant urges that the trial court should have compelled the People to accept appellant's stipulation as to location of the entrance and exit wounds and excluded the photographs. Appellant cites *People v. Hall* (1980) 28 Cal.3d 143, 152 (overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 415) for the proposition that "If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively." But, if the facts to which the defendant offers to stipulate retain probative value, then evidence of the facts must be introduced. (*People v. Hall, supra,* at p. 152.) In this case, the photographs were relevant to the People's theory that appellant killed Bustamonte in a premeditated and deliberate manner and not in self-defense because Bustamonte was falling down when he was shot in the top of the head.

Moreover, we conclude that the photographs were not unduly shocking or prejudicial. The trial court noted that the photographs minimized the damage, focused on the wounds, tracked the wounds, and were not bloody, gruesome, or likely to inflame the jury.

We conclude that the trial court did not abuse its discretion in refusing to exclude the photographs. Having found no error, we reject appellant's argument that cumulative prejudicial error occurred. (*People v. Seaton* (2001) 26 Cal.4th 598, 675, 691–692.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

ASHMANN-GERST

We concur:

_____, Acting P. J.

DOI TODD

_____, J.

CHAVEZ